The Indiana Prosecutor

June/July 2007

Good News!

That last legislative session included many silver linings but none so sweet as a salary increase. As of July 1st State paid prosecutors receive a 4% increase in their salary. The new salaries will be as follows:

Full time Elected Prosecutor	$119,893.74
Part time Elected Prosecutor in a 66% County	$ 80,039.48
Part time Elected Prosecutor in a 60% County	$ 73,006.38
Full time Chief Deputy	$ 90,589.14
Part time Chief Deputy in a 66% County	$ 58, 363.89
Part time Chief Deputy in a 60% County	$ 55,423 .62
State Paid Deputy in a 66% County	$ 60, 698.45
State Paid Deputy in a 60% County	$ 55,423.62

The new pay increase should be reflected in your July 18th check.

Increase In Special Prosecutor Fees

Due to the increase in the Full Time Prosecutor salaries, Special Prosecutor rates will also go up.

The new per diem rate will be $461.13 with hourly rates of $61.48 based on a 7.5 hour work day and $57.64 based on an 8 hour work day. Please remember that a Special Prosecutor can not bill more per day than the daily per diem.

Diversion and Deferral Fees

According to the State Board of Accounts, Diversion Fees will go up one dollar. This increase is due to the judicial salary increase. Please adjust your Diversion Agreements accordingly.

Deferral Fees will not increase.

Inside this Issue

- *Where a trial court imposes sentence for a felony offense it is required to issue a sentencing statement that includes a reasonably detailed recitation of the trial court's reasons for the sentence imposed.*

Anglemyer v. State, ___ N.E.2d ___ (Ind. 6/26/07).

The Indiana Supreme Court has clarified many issues surrounding sentencing in this decision. Anglemyer was an 18 year old man who called a restaurant to have a pizza delivered. He gave the driver the address of an abandoned house, beat him severely when he arrived with the pizza, and then stole his money. Anglemyer pled guilty to Robbery as a Class B felony and Battery as a Class C felony. In his behalf at sentencing, defense counsel argued that Anglemyer's sentence should be minimalized due to the mitigating factors of his young age and his documented history of mental illness. The Trial Court acknowledged his age as a mitigating fact but did not include his mental illness a statement. It then found that he should serve the presumptive/advisory sentence of ten years for the Robbery and then enhanced the Battery to two years above the presumptive. The Counts were then, pursuant to the plea, run consecutive to each other for a total executed sentence of sixteen years.

In 1977, the legislature initiated legislation to provide uniformity in sentencing. To this end they passed statutes establishing upper and lower boundaries for sentences with a presumptive sentence in the middle. In order for a court to deviate from the presumptive sentence, the judge had to find either mitigating or aggravating factors.

In the United State's Supreme Court decision *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court found that statutes that allowed for the increase of a sentence above the statutory maximum based on factors that were not proven to a jury beyond a reasonable doubt violated the Fourteenth Amendment Due Process Clause. The only exception to this requirement was the fact that defendant had a prior conviction. The Court clarified it's Apprendi decision in *Blakely v. Washington*, 542 U.S. 296 (2004) by deciding that "the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."

Our Supreme Court in *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), found that the Indiana sentencing statutes violated the rules of *Apprendi* and *Blakely* and declared them to be unconstitutional. To avoid the problems envisioned by these cases, the legislature removed the presumptive sentence element and eliminated the requirement of finding mitigating or aggravating circumstances. The legislation, however, provided a non-exhaustive list of aggravating and mitigating circumstances that the courts could use in determining sentences. The Court of Appeals has since been divided on the issue of whether a sentencing court must provide aggravating or mitigating circumstances to explain their decisions or whether they needed to provide any statement at all. The Supreme Court accepted transfer of Anglemyer to clarify these questions.

Finding that a sentencing statement must be made by a trial court when sentencing on a felony offense, the Supreme Court noted "Sentencing statements provide two primary purposes: (1) they guarde[d] against arbitrary and capricious sentencing, and (2) they provide[d] an adequate basis for appellate review." Even though a trial judge does not need to find aggravating circumstances to provide the maximum penalty under the statute, without providing the court's reasoning for the sentence, an Appellate Court is unable to address claims of inappropriateness. During a sentencing statement a trial court is required to provide its reasons for handing down the sentence. "The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." However, a court is not required to record aggravating or mitigating factors in it's sentencing statement.

Reviewing the appellate court process, the Court noted that the review and revise powers were limited. Sentencing still remains under control of the trial judge and can only be reviewed for an abuse of discretion. It is here where the sentencing statement becomes most important. To promote an accurate review of a sentence, a sentencing statement must contain facts and details "which are peculiar to the particular defendant and the crime, as opposed to general impressions or

Continued on page 3

conclusions. Of course such facts must have support in the record." If the appellate court finds that the sentence is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn herefrom" it may declare the sentence to be an abuse of discretion and then may revise the sentence or remand for further proceedings.

The Court provided examples of when an abuse of discretion may be found. They specified that the following examples may be remanded back for resentencing: when the trial court fails to make a sentencing statement; where the specified reasons for imposing the sentence are not supported by the record; where the sentencing statement does not address reasons that are clearly present in the record and were argued by a party; and where, as a matter of law, the reasons given are improper. A trial court does not have to balance aggravating versus mitigating factors or reasons when imposing a sentence. Therefore a trial court can not abuse its discretion for failing to properly weigh these factors. "The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse" of discretion.

Under Appellate Rule 7(B), an appellate court may revise a sentence if after review the sentence is inappropriate in light of the nature of the offense and the character of the offender. "It is on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue."

Any factor that is not argued at the time of sentencing is not viable for argument on appeal.

At sentencing, Anglemyer alleged two mitigating factors, the defendant's young age and his mental disability. Those are the only factors the Court reviewed for an abuse of discretion claim. While the Trial Court did not specifically provide a sentencing statement, the court did provide an analysis of mitigating and aggravating circumstance while explaining why each was determined to be so. The Court found this to be sufficient for review.

One aggravator that was identified, the seriousness of the offense, included both the nature and circumstances of the crime as well as the manner in which the crime was committed. The Court found that this was a aggravating factor which was supported by case law and found no error. While the trial court noted that the defendant's age was a mitigating factor the record is silent as to whether the trial court also addressed the defendant's mental health as a mitigating factor. Where a trial court finds mitigating factors the court must address all "significant" mitigating factors. The Supreme Court noted that the trial court questioned defense counsel on the issue of defendant's mental health, specifically whether the defendant chose not to participate in counseling or take medication which would have controlled his behavior. The trial judge commented that the victim was injured because the defendant had rejected help. The court found that because the trial court had addressed the issue of defendant's mental health but had not cited it as a mitigating factor is was fair to assume that the trial court had not missed this factor but had instead found it not to be a "significant" factor to influence his sentencing determination. The Supreme Court affirmed the defendant's sentence.

- *Portions of the confinement statute found to be unconstitutional.*

Brown v. State, ___N.E.2d ____ (Ind. 6/22/07).

Richard Brown telephoned several men in Marion County. Pretending to work for a local radio station, Brown instructed the men that the station was running a contest that would award the recipient a new car or cash for completing the assigned task. Brown told the men that they were required to leave their places of employment, drive to a specified residence, enter the residence, remove all their clothing and exchange the clothes for a T-shirt. Three men contacted by Brown appeared at the location which was actually Brown's home. Two of the men followed through exchanging their clothes for a t-shirt given to them by Brown. After they completed the task and did not receive the promised reward, the pair contacted the radio station only to discover that Brown was not an employee and that the contest was a hoax.

Brown was charged with three counts of Criminal Confinement on the theory that he used fraud or enticement to

Continued on page 4

remove each person from one place to another. He was also charged with three counts of identity deception. At trial, he was convicted of all charges. On appeal, Brown argued that the criminal confinement statute was void for vagueness because it did not provide adequate notice to defendants about what conduct had been criminalized nor gave minimal guidelines that would allow an individual to distinguish criminal conduct from innocent conduct.

The Supreme Court noted that even though a statute is presumed to be constitutional, it can be void for vagueness if it does not clearly define its prohibitions. Citing *Rhinehardt v. State*, 477 N.E.2d 89 (Ind. 1985), the court wrote "there must be something in a criminal statute to indicate where the line is to be drawn between trivial and substantial things so that erratic arrest and conviction for trivial acts and omissions will not occur. It can not be left to juries, judges, and prosecutors to draw such lines. Accordingly, the statutory language must convey sufficiently definite warning as to the proscribed conduct when measured by common understanding."

Three terms of the confinement statute were alleged by Brown to be unconstitutionally vague: "remove," "fraud," and "enticement." Since none of the terms were statutorily defined the Court used a common dictionary to define each. "Remove" was defined as moving from a place or position. The Court found that this word, when read in conjunction with the improper means provision of the statute, fairly informed a reasonable person of the prohibited conduct. Therefore, the word "remove" as used in the confinement statute does not violate a constitutional standard and is appropriate for continued use.

"Fraud" and "Enticement", however, do not clearly establish what specific conduct is prohibited.

The definition of enticement is characterized as to attract, lure or tempt another by arousing hope or desire. Justice Dickson noted that removal by enticement can be applied "to criminalize an assortment of legitimate, normal everyday behavior." Unfortunately the justices felt this reasoning applied likewise to "Fraud." They noted that Fraud was defined as an act of trickery, deception or deceit. Justice Dickson felt that this could apply to circumstances such as "using misleading reasons to secure a person's attendance for their surprise birthday celebration; evoking Santa Claus's watchful eye to induce a child to go to bed; employing flattery or exaggeration to motivate another person to attend an event; asserting an untruth to persuade an Alzheimer's patient to enter the location of a care giver."

The Court found that both Fraud and Enticement were too vague to notify a person of reasonable intelligence what actions would be considered illegal. Therefore the portion of the confinement statute that relies on "fraud" and "enticement" is void for vagueness. This does not invalidate the entire confinement statute and is limited to only the inclusion of the words "fraud" and "enticement".

Brown also argued that the evidence was insufficient to convict him of identity deception. Under Court analysis of the identity deception statute, I.C. 35-42-5-3.5, the State was required to prove that the defendant used *an individual*'s identifying information. Here, Brown represented that he was from a radio station and even used an alias but did not convey the name, address, date of birth, or other identifying information of an existing human being. Therefore, there was not sufficient evidence to convict him of identity deception. Brown's conviction was reversed on all counts.

- ***Exclusion of Defense Witnesses Required Reversal***

In the past few weeks, the Indiana Supreme Court has reversed two convictions based on the exclusion of defense witnesses. The results of these decisions require prosecutors to think carefully before asking to have even late discovered witnesses excluded.

Rohr v. State, ___ N.E.2d____ (Ind. 5/15/07).
Aaron Rohr was charged with murdering his girlfriend's five year son, Samuel. Samuel died of multiple blows to his body. There was evidence that both his mother and Rohr engaged in corporal punishment on the child.

At the initiation of this case, the court set a discovery deadline ordering that "ANY WITNESSES OR EXHIBITS NOT DISCLOSED BY THIS DATE, [July 1, 2005] WILL ABSOLUTELY BE EXCLUDED AT TRIAL." The State filed it's written motion of discovery on the last day of the deadline given by the court, June 30, 2005 indicating that it had provided defense with over 800 pages of medical records, 2 video tapes, 3 CD's, and 1 audio tape. On July 1, 2005 defense filed a witness and exhibit list. Four days before trial and almost a month after

Continued on page 5

the deadline ran, defense added two additional witnesses to their list. The State filed a motion to exclude the witnesses. Defense counsel argued that the State's delay in providing voluminous discovery affected their ability to discover the additional witnesses in a timely manner and that they could not determine their defense strategy including which witnesses to call until they perused the discovery. The court excluded the witnesses. Rohr was convicted at trial and sentenced to Life Without Parole.

On review the Supreme Court noted that "trial courts have the discretion to exclude a belatedly disclosed witness when there is evidence of bad faith on the part of counsel or a showing of substantial prejudice to the State." They noted that a court should weigh the following factors before deciding to exclude a witness's testimony: 1) the point in time when the parties first knew of the witness; 2) the importance of the witness's testimony; 3) the prejudice resulting to the opposing party; 4) the appropriateness of instead granting a continuance or some other remedy; and 5) whether the opposing party would be unduly surprised and prejudiced by the inclusion of the witness's testimony.

The witnesses Rohr intended to add were two women who would have testified that they had witnessed Samuel's mother, Donna Moore, beat Samuel previously. Since both Rohr and Donna Moore were equally able to have perpetrated abuse on Samuel, the witnesses' testimony was highly relevant to Rohr's defense that he had not killed Samuel. The Court also noted that the State disclosed these women to Rohr through discovery and therefore was aware of their existence at least thirty days prior to trial. They reasoned that this gave the State ample opportunity to interview them. Because the State knew of the existence of the women, the testimony of the witnesses was essential to Rohr's defense and that there was no evidence presented that defense counsel had acted in bad faith, the trial court erred in excluding the witnesses and the conviction was reversed.

In this case and in the following case, the Supreme Court notes that the appropriate remedy in these situations is for the prosecution to ask for a continuance. Because Rohr had moved for a speedy trial, the prosecution was reluctant to do so. However, the Court observed that under these circumstances the need for a continuance would have been partly due to Rohr's acts and that he would not have been disadvantaged by a continuance under Criminal Rule 4.

Vasquez v. State, ___ N.E.2d ___ (Ind. 6/22/07)

Juan Vasquez was charged with burglarizing a home with two other men. One of the co-defendants was caught at the scene, but not Vasquez. He was later identified by his captured companion as having been involved in the break in. Vasquez was charged with Burglary. At arraignment the trial court discovered that Vasquez does not speak English. His defense attorney does not speak Spanish which presented difficulties in preparing for trial.

On the first day of trial, Vasquez told his attorney that he had a witness who would testify that he overheard the co-defendant make plans to burglarize the home and place the blame on Vasquez if caught. Vasquez's attorney immediately notified the State but did not add the witness to his list until after the State closed its case the following day. Citing the substantial prejudice to the State, the trial court precluded the witness from testifying. Vasquez was convicted.

On appeal, Vasquez argued that he was denied compulsory process under the Sixth Amendment to the U.S. Constitution and Article 1, Section 13 of the Indiana Constitution. The Supreme Court noted that "The most extreme sanction of witness exclusion should not be employed unless the defendant's breach has been purposeful or intentional or unless substantial and irreparable prejudice would result to the State." Under the analysis presented in Rohr above, the court determined that the late-disclosed witness should not have been excluded.

The Court noted that defense counsel first learned of the witness on the first day of trial and immediately notified the State, the witness' testimony was extremely important to the defense, and there was no indication that defense counsel acted in bad faith. The Court did observe that the addition of the witness presented a substantial challenge to the State's trial strategy. While the State could have asked for a continuance, they noted that it would have been diminished the effect of the evidence on the jury. However, defendant's right to present evidence outweighed the effect on the State. The Court summed up their analysis with a quote from *Williams v. State*, 714 N.E.2d 644 (Ind. 1999), which we will undoubtedly hear again "We again emphasize that there is a strong presumption to allow the testimony of even late-disclosed witnesses."